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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN DENNERY,

Defendant and Appellant.

B282283

(Los Angeles County
Super. Ct. No. BA450701)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed as modified.

David W. Scopp, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Sean Dennery of assault with a deadly weapon and found true an allegation that he personally inflicted great bodily injury upon the victim. Dennery, who is a stand-up comedian, claimed he was acting in self-defense when he stabbed another comedian three times in the back with a knife after a comedy show. On appeal, Dennery contends the prosecutor committed *Doyle*¹ error and other misconduct, the court erred in admitting a video of a comedy routine as an adoptive admission, and the cumulative effect of these errors requires reversal. He also contends the court improperly issued a restraining order against him. We strike the restraining order and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On September 30, 2016, Dennery, who is a stand-up comedian and goes by the stage name White Tyson, hosted a comedy show at a theater in Los Angeles. After the show, Dennery and several other comedians, including Lee T. (Lee), were socializing in the parking lot outside the theater. Dennery and Lee had an argument, which led to Dennery stabbing Lee three times with a knife. Lee suffered stab wounds to the right side of his body—two in the back above his hips, and one lower on his backside—which injured his liver and kidneys. Lee spent two days in an intensive care unit and was discharged from the hospital four days after the incident.

Dennery was charged by information with a single count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).²

¹ *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

² All further unspecified statutory references are to the Penal Code.

It was further alleged that in the commission of the offense, Dennery personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)).

The case was tried to a jury in January 2017. Dennery did not dispute stabbing Lee, and the primary issue for the jury to decide was whether Dennery acted in self-defense.

Prosecution Evidence

Witness Testimony

Lee testified that he is homeless and sells jokes on the streets in Venice. He is 6 feet 3 inches tall, and weighs 200 pounds. Lee kept himself in good physical condition and had informal training in judo. He owns two firearms, and has a tattoo with a Latin phrase meaning “to ensure peace, prepare for war.”

Lee and Dennery became friends after meeting in Venice a couple months before the incident. The day of the incident, Dennery told Lee he could not perform at his comedy show that night. Lee nonetheless showed up and performed a set. Lee was drunk and his memory of the night was not clear.

After the show, Lee was talking to Dennery and some other comics in the parking lot outside the theater. Dennery became verbally aggressive with Lee, and Lee told Dennery he was “just mad that I’m funnier than you.” The two eventually got “a little loud with each other, in each other’s faces,” and there was some pushing and shoving. At one point during the altercation, Lee turned his back to Dennery to try to leave the parking lot, and he felt a punch to his back. Lee saw that he was bleeding and figured he had been stabbed. He yelled that Dennery could not return to Venice.

Lee admitted he may have pushed Dennery during the altercation, but denied brandishing a weapon, threatening Dennery, or swinging at Dennery with his fists. Lee was certain he was not the initial aggressor “because when [I’m] the initial aggressor, I would punch, and it would have been a fight. I would have beat him down. That’s how I know.”

Cameron G. was in the parking lot outside the theater with about seven people the night of the incident. Cameron saw Lee and Dennery “rough housing” in what seemed to be a playful manner. He did not see Lee punch or attack Dennery. The altercation started to get more serious, and Lee appeared to be struggling to get away from Dennery. Cameron eventually helped separate the two, and he saw that Lee had been stabbed. Dennery yelled, “I stabbed you motherfucker. I stabbed you. I stabbed you in the kidneys. You have to go to the hospital. I’m White Tyson, motherfucker.”

According to Cameron, after he was stabbed, Lee grabbed a skateboard and swung it at Dennery to keep him at a distance. Dennery left the area, but eventually returned and said, “this motherfucker’s going to die tonight.”

A few weeks after the incident, Dennery confronted Cameron at the theater. Dennery said he was angry because a police officer testified in court that Cameron had identified him as the suspect. Cameron felt intimidated and afraid, and was hesitant to testify as a result.

Vaughn H. was also outside the theater the night of the incident. He saw Lee and Dennery wrestling, the way brothers might, but did not know who was the instigator. At one point, Dennery got behind Lee and made multiple stabbing motions with his right hand. Dennery said, “well, now you need to call an

ambulance because I got you in the lungs or the kidneys.” Vaughn yelled at Dennery, “why did you do this,” and Dennery replied, “because I’m White Tyson, bitch.”

Sometime after the stabbing, Dennery and Lee “went at each other” again, and Lee started swinging his skateboard. Dennery left on his bike, but returned a short time later and said, “Fuck this. I’m just going to kill him tonight.”

A few months after the incident, Dennery went to Vaughn’s work and told him not to testify. Dennery suggested that Vaughn not show up at court or just say he was too drunk to remember what happened. Vaughn was generally afraid of Dennery, but he did not feel threatened.

Los Angeles Police Officer James DeCoite responded to a radio call of a stabbing in the early morning of September 30, 2016. When he arrived at the scene, he saw Lee with a white shirt wrapped around his torso, soaked with blood. Lee was angry, volatile, and erratic. When Officer DeCoite asked him what happened, Lee responded: “Fuck you. Get me a doctor.”

Officer DeCoite spoke to Cameron, Vaughn, and one other witness who was present during the incident. All three initially said an unknown transient had stabbed Lee. After Lee left in an ambulance, they admitted Dennery had stabbed Lee. They told the officer they were initially hesitant to give additional information because they were afraid of Dennery and Lee.

Dennery was arrested about a block from the theater and taken to the police station for questioning. Dennery was calm and had a small mark on his ear, but he did not appear to be cut or bleeding.

Surveillance Video

The prosecutor played for the jury a video of the incident recorded by a surveillance camera located inside a nearby laundromat. The video quality is not particularly good, and the view of the incident is partially obstructed at times by a large pillar. The video shows several individuals casually standing in a parking lot. A few minutes into the video, Dennery and Lee appear in the frame. They are already in the midst of a physical altercation and pulling or pushing at each other with their hands. A few seconds later, Lee appears to turn his back to Dennery, and Dennery makes three stabbing motions directed at Lee's lower back. Several bystanders run over to them, and Dennery casually walks away.

Comedy Routine Video

The prosecutor also played for the jury a video depicting a comedian performing a stand-up routine a few weeks after the incident. Dennery can be seen sitting in the audience a few feet from the stage. During the routine, the comedian says he was told Dennery stabbed someone six times in the back for saying Dennery was not funny. The comedian then engages directly with Dennery, and the following exchange occurs:

“Comedian: [W]hat did you stab him with?

“[Dennery]: Eh . . . I don't know

“Comedian: What is it going to ruin your act?

“[Dennery]: Allegedly . . . you have to say allegedly though.

“Comedian: No I don't. Alright . . . allegedly. I wasn't there.”

The comedian proceeds to discuss why Dennery should not take the case to trial, explaining that a jury would convict him solely because he has a face tattoo. Dennery appears to be laughing throughout the routine.

Dennery uploaded the video to YouTube on October 25, 2016. The same day, he sent a copy of the video to Vaughn.

Defense Evidence

Dennery testified in his own defense. According to Dennery, the day of the incident, he told Lee not to come to the theater because he was concerned that Lee would get too drunk. Lee showed up anyway.

Outside the theater after the show, Dennery told Lee he had to stop getting drunk because it was scaring away patrons. Lee responded that Dennery was upset because Lee is funnier. Dennery told Lee he “smelled like shit” and was not funny. Lee threw his skateboard at Dennery and said he was going to drag him to the street and “fuck [him] up.” The skateboard hit Dennery’s ear, which ripped the skin and caused bruising.

Lee grabbed Dennery—who is 5 feet 10 inches tall and weighs 150 pounds—by the shoulder and started pulling him toward the street. At one point, Lee pulled Dennery’s shirt completely over his head. At that moment, Dennery feared for his life because he could not see and he heard nearby traffic. He was also concerned that Lee may still have the skateboard. To protect himself, Dennery grabbed a knife from his back pocket and started swinging, trying to get Lee away from him. Dennery did not know where he had stabbed Lee until a few days later. Dennery suffered bruising and cuts to his ear and hand.

After he stabbed Lee, Dennery went to retrieve his belongings from the theater. When he returned to the parking lot to get his bike, Lee jumped on top of a generator and swung his skateboard at Dennery. As Dennery was riding away, Lee shouted that he could not go back to Venice. Dennery turned around and shouted something along the lines of “I’ll kill you right now.”

Dennery left the area, but a short while later decided to return to the theater to turn himself in to the police. As he was riding back, he was stopped by the police and arrested.

The day he was released on bail, Dennery went to the theater to retrieve his phone. Cameron was at the theater, and Dennery said he was mad that Cameron had fingered him to the police. Cameron denied doing so, and Dennery believed him.

Later that day, Dennery ran into Vaughn by happenstance. Vaughn said he was “wasted” drunk the night of the incident, and if asked to testify, he would be at the bar getting drunk. Dennery responded that it did not matter if he testified since he did not see how the fight began.

With respect to the video of the comedy routine, Dennery explained that he and the comedian were the last two people at an open mic night. When the comedian was on stage, he started “riffing” about the incident. Dennery tried to get him to stop, and told the comedian to say “allegedly.” Dennery explained that he did not press the comedian any further because it would only “add fuel to the fire,” and “you’re not supposed to interrupt other comics while they’re up there.” Dennery uploaded the video to YouTube because one of his friends wanted to see it. He also sent the video to Vaughn, at his request.

Verdict and Sentencing

The jury found Dennery guilty of assault with a deadly weapon and found true the great bodily injury allegation. The court sentenced Dennery to an aggregate term of six years, consisting of the mid-term of three years on the assault with a deadly weapon charge, plus three years for the great bodily injury allegation. The court also issued a restraining order preventing Dennery from having contact with the victim and witnesses for 10 years. Dennery timely appealed.

DISCUSSION

I. There Was No Prejudicial *Doyle* Error

Dennery asserts the prosecutor committed *Doyle* error by presenting evidence that he declined to give a statement to police, and then using that evidence as proof Dennery did not act in self-defense.³ We find no prejudicial error.

A. Governing Law

In *Doyle, supra*, 426 U.S. 610, the United States Supreme Court held it is a violation of due process for a prosecutor to impeach a defendant at trial using his post-arrest silence after receiving *Miranda*⁴ warnings. (*Id.* at p. 619; see also *Wainwright v. Greenfield* (1986) 474 U.S. 284, 295, fn. 13.) The court explained that such silence is “insolubly ambiguous” because it may signal nothing more than the arrestee’s exercise of his *Miranda* rights. (*Doyle, supra*, 426 U.S. at pp. 617–619.) Moreover, because the *Miranda* warnings imply that silence will

³ Dennery also contends the prosecutor’s use of the video of the comedy routine constituted *Doyle* error. We address that argument in the next section.

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436.

not be used against the arrestee, “it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.” (*Doyle*, at p. 618.) Although *Doyle* specifically concerned impeachment of a testifying defendant, the prosecution is also precluded from using a defendant’s silence as part of its case-in-chief. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118 [“No less unfair is using that silence against a defendant by means of the prosecutor’s examination of an interrogating detective even before the defendant has had the opportunity to take the stand.”].)

Doyle error has two components, both of which must exist: (1) the prosecution makes use of the defendant’s post-arrest silence against him or her, either by questioning or by reference in closing argument; and (2) the trial court permits that use, usually by overruling a defense objection and conveying to the jury the impression that the prosecutor’s use of the silence is legitimate. (*People v. Evans* (1994) 25 Cal.App.4th 358, 368 (*Evans*).)

B. Analysis

1. Direct Examination of Officer DeCoite

Dennerly first contends the prosecutor committed *Doyle* error during his direct examination of Officer DeCoite. During the examination, the prosecutor elicited testimony about Dennerly’s arrest the night of the incident, after which the following exchange occurred:

“[Prosecutor]: So we got a suspect in custody. What do you typically do at that point once you have a suspect in custody?”

“[DeCoite]: That unit transports that suspect back to Hollywood Station where we continue our investigation.

“[Prosecutor]: Did you go to Hollywood Station as well?

“[DeCoite]: Yes, sir.

“[¶] . . . [¶]

“[Prosecutor]: Did the defendant make any statements to you at this point?

“[DeCoite]: No, sir.”

Defense counsel objected. At sidebar, counsel argued the prosecutor’s question was improper because it “raises real inferences that the jury’s not supposed to consider.” The prosecutor responded: “Basically what I was going to indicate is that [Dennerly] was properly *Mirandized*, and he didn’t have to make a statement. That is part of the constitution. If the court doesn’t want me to do that, I can absolutely move past that.”

The court cautioned that “if [Dennerly] were to have chosen to exercise his right not to speak, no mention of that can be made.” The court explained: “[A]ny evidence to suggest that the defendant did exercise his Fifth Amendment right against self-incrimination would lead to automatic reversal or a mistrial. But under these circumstances, there’s been no answer to the question nor any suggestion the defendant exercised his right against self-incrimination.⁵ So I think we can just shift gears and proceed forward.” The court clarified that it was sustaining

⁵ We note that the record reflects Officer DeCoite responded “No, sir.” Defense counsel was also apparently under the impression that no answer was given to the question. We can only assume the officer’s answer was not readily heard by anyone except the court reporter who sat very close to the witness.

the objection, instructed the prosecutor to “shift gears,” and then ended the sidebar. The prosecutor did not ask the officer any additional questions about Dennery’s statements.

Initially, we address the Attorney General’s contention that Dennery forfeited this claim by failing to seek a curative admonition from the trial court. To preserve a *Doyle* claim on appeal, the defendant must object in the trial court and request a curative admonition, unless to do so would be futile. (See *People v. Tate* (2010) 49 Cal.4th 635, 692; *People v. Collins* (2010) 49 Cal.4th 175, 202; *People v. Jablonski* (2006) 37 Cal.4th 774, 835.) Dennery insists he preserved his claim by objecting to the *Doyle* error and subsequently requesting an admonition, which the court refused. Therefore, he contends, any further requests would have been futile.

The record belies Dennery’s assertions. Instead, it demonstrates that the court was attentive to his objection and that counsel made no request for a curative instruction. When Dennery objected, the trial court immediately cautioned the prosecutor that “if [Dennery] were to have chosen to exercise his right not to speak, no mention of that can be made.” The court explained: “[A]ny evidence to suggest that the defendant did exercise his Fifth Amendment right against self-incrimination would lead to automatic reversal or a mistrial.” The court sustained the objection and told the prosecutor to move to another subject. Defense counsel, apparently content with this resolution, requested no further action from the court.

Dennery contends he nonetheless preserved his claim by requesting a curative admonition later in the trial. In support, he points to the following exchange, which occurred directly after

counsel requested an admonition concerning a separate, unrelated claim of alleged prosecutorial misconduct:

“[Defense counsel]: There was also earlier in the trial, when the prosecutor went into the suspect’s—what did the suspect say to police at the station, I mean that’s absolutely textbook law inadmissible question. There’s no—I mean it’s a situation where it’s a clear—a clear misconduct to ask that kind of question. So I would ask that—

“The Court: Well, it shouldn’t have been asked as I recall it. I mean it kind of bordered on *Griffin* error,^[6] but it wasn’t *Griffin* error. It wasn’t a situation—

“[Defense counsel]: But I—

“The Court: Well, you did. And you preserved it. So it will be considered as well as the other things you mentioned. And we can just leave it at that. But I’ll note that the question did not in any way assume or suggest that the defendant made no statement at the police station. The question was more along the lines of what did he say, and then I had you approach, and we discussed it and moved on to the next point. So it wasn’t *Griffin* error.

“[Defense counsel]: Correct. But just to admonish the prosecutor to be careful with issues that go to the ultimate issue and not elicit improper testimony.

“The Court: Well, the jurors know that they’re the ones who have to make factual determinations in the case. And actually, I mentioned that. I have mentioned that during the course of the trial that ultimately it’s their call

⁶ The court apparently referred to *Doyle* error as *Griffin* error.

what the facts of the case are. So certainly during the instructions I'll repeat it again and undoubtedly during the trial. I'll have a few things to say about that too. Again so—

“[Defense counsel]: If I find myself in a position to need to make that objection—

“The Court: Just make it. [¶] . . . [¶] Well, just say objection, and state your reason as you would for any objection, and I'll rule on it. And we can cure whatever the situation is as we would normally do.”

We do not agree that this exchange was sufficient to preserve Dennerly's *Doyle* claim. It is clear from the record that counsel's request for an admonition was related to the other, unrelated claim of prosecutorial misconduct, and not the *Doyle* error. Indeed, counsel's request came only after she agreed with the court that there had been no *Doyle* error. Moreover, counsel specifically requested the court admonish the *prosecutor* not to ask questions that go to the “ultimate issues.” Counsel never requested an admonition to the *jury* related to the prosecutor's use of Dennerly's silence after an invocation of *Miranda* rights. Accordingly, Dennerly has not sufficiently preserved this claim.

Even were we to consider the merits of the issue, we are not convinced there was a violation of *Doyle*. The trial court did not overrule defense counsel's objection to that issue, as is a prerequisite to a finding of error in this arena. (*Evans, supra*, 25 Cal.App.4th at p. 368.) Instead, the trial court told the prosecutor to end the line of questioning and move to a different topic. We do not mean to condone the prosecutor's decision to explore this area of inquiry and, in fact, express our disapproval of him having done so. We only find that the single question—the

answer to which was unheard by court and counsel—and the trial court’s handling of the matter did not amount to a violation of the legal precepts we have set forth.

In any event, any error was harmless. *Doyle* error is harmless if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Galloway* (1979) 100 Cal.App.3d 551, 559.)

Dennerly insists the *Doyle* error was prejudicial because it undermined his claim of self-defense. A defendant is entitled to acquittal if the evidence raises a reasonable doubt of self-defense. (See *People v. Ayers* (2005) 125 Cal.App.4th 988, 997.) To justify an act as self-defense, the defendant must have an honest and reasonable belief that bodily injury is about to be inflicted on him. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064–1065.) The risk of injury must be imminent, and the defendant may not use more force than is reasonable under the circumstances. (*Ibid.*) As a result, “deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury.” (*People v. Clark* (1982) 130 Cal.App.3d 371, 380 abrogated on other grounds by *People v. Blakeley* (2000) 23 Cal.4th 82; accord *People v. Hardin* (2000) 85 Cal.App.4th 625, 629; see *People v. Lopez* (1948) 32 Cal.2d 673, 675; see also CALJIC No. 5.31 [assault with fists does not justify use of deadly weapon in self-defense unless it is reasonable to believe the assault is likely to inflict great bodily injury].)

The evidence that Dennerly was not acting in lawful self-defense was overwhelming. The surveillance video, location of the stab wounds, and testimony from Lee, Cameron, and Vaughn,

each demonstrated that Dennery was the aggressor and stabbed Lee while his back was turned. The evidence of Dennery's behavior after the incident was also inconsistent with a claim of self-defense. The surveillance video shows Dennery casually walking away after stabbing Lee, and it was undisputed that Dennery did not tell any of the witnesses that he was acting in self-defense. Further, Cameron and Vaughn testified that Dennery confronted them after the incident in a way that suggested he did not want them to testify at trial, which showed a consciousness of guilt. Dennery also failed to correct the comedian when he accused Dennery of stabbing Lee in response to an insult. Based on this evidence, no reasonable juror could have concluded that Dennery's motivation in stabbing Lee was self-defense.

Moreover, even if Dennery acted out of an honest fear for his safety, the evidence was overwhelming that his use of force was unreasonable under the circumstances. It was undisputed that Lee was unarmed and did not choke, punch, kick, or otherwise strike Dennery at any point after the physical altercation began. At most, Lee was using his hands and arms to wrestle or push Dennery while the two were in a standing position. Although Lee was significantly larger than Dennery, the surveillance video of the incident makes clear that he did not dominate or overwhelm Dennery at any point. Dennery, in fact, suffered only superficial injuries to his ear and hand. Moreover, Lee testified that he turned his back to Dennery and attempted to get away immediately before he was stabbed. This was consistent with the surveillance video of the incident, Lee's wounds, and Cameron's and Vaughn's testimony. Based on this evidence, no reasonable person would conclude that Lee

presented an imminent threat of death or great bodily injury. Dennery's use of force likely to cause great bodily injury—multiple knife stabs to a vulnerable part of Lee's body—was plainly excessive under the circumstances.

Dennery's testimony was the only evidence to even suggest he was acting in lawful self-defense. According to Dennery, Lee initiated the altercation by throwing a skateboard at his head, threatening to "fuck [him] up," and then grabbing Dennery by the shoulders and dragging him in the direction of the street. Dennery, however, testified that he did not actually believe it was necessary to use his knife until Lee pulled his shirt completely over his head. At that point, Dennery feared for his life because he was blinded, could hear traffic, and was being dragged toward the street. Dennery was also concerned that Lee might attack him with the skateboard. Dennery then decided to swing his knife in an attempt to get Lee away from him.

While this testimony viewed in isolation may have been sufficient to create a reasonable doubt as to whether Dennery acted in lawful self-defense, the testimony lacked any evidentiary weight because it was directly contradicted by the surveillance video of the incident. Contrary to Dennery's testimony, the video makes clear that Lee did not pull Dennery's shirt over his head immediately prior to the stabbing. The video also clearly shows Dennery forcefully and deliberately stabbing Lee in a vulnerable area of his body, not swinging the knife indiscriminately as he claimed at trial.

The video further demonstrates the unreasonableness of Dennery's assertion that he feared Lee might attack him with the skateboard. The video shows Lee and Dennery wrestling with their hands for several seconds before the stabbing, which would

have been impossible if Lee was holding a skateboard. Moreover, at the time of the stabbing, Lee and Dennery were at least several yards from where Lee allegedly threw the skateboard at the start of the altercation. Under these circumstances, there is no conceivable way Dennery could have reasonably believed Lee was holding, or had immediate access to, the skateboard.

Given the overwhelming evidence that Dennery was not acting in lawful self-defense, and the fact that his testimony to the contrary was directly contradicted by the surveillance video, it is beyond a reasonable doubt that the jury would have convicted Dennery absent the *Doyle* error. Accordingly, the error was harmless and does not warrant reversal. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

2. Cross-Examination of Dennery

Dennery next takes issue with an exchange that occurred during his cross-examination. The prosecutor was questioning Dennery about his claim that he was unable to see during the altercation because Lee had pulled his shirt over his head. The prosecutor then played portions of the surveillance video, after which the following colloquy took place:

“[Prosecutor]: So because you were justified in your actions surely you told *somebody* that night you were acting in self-defense. Right?

“[Defense counsel]: Objection, Your Honor. May we approach?

“The Court]: Well, at this point the question is did he mention that to *anyone*.

“[Dennery]: I chose to not speak to the police officers.

“The Court: *No. We’re not talking about the police. Anyone. Anyone.*

“[Dennergy]: The people I saw were the police officers after it happened.

“The Court: Okay. Next question.” (Italics added.)

Before the prosecutor asked his next question, and at defense counsel’s request, the court held a sidebar outside the presence of the jury. The following exchange occurred:

“[Defense counsel]: That’s what I was trying to get away from. See, when you ask something like did you tell anyone, then that naturally, you know, includes the only people you would have spoken to prior to going to jail.

“[Prosecutor]: He’s on the stand. I mean he’s waived his Fifth Amendment right at this point.

“[¶] . . . [¶]

“[Prosecutor]: I asked anyway. I wasn’t going to ask the officer.

“The Court: Apart from all that, how many people were here? Three at least, three other people.

“[¶] . . . [¶]

“The Court: If I were similarly situated, I certainly wouldn’t be discussing this with other people who had witnessed it. But that’s what this question is going to.

“[Defense counsel]: Disregard this.

“[Prosecutor]: I’m fine with that.

“The Court: Okay.

“[Prosecutor]: *To be clear, I was talking temporally. All my questions were directly involving the actual incident. Nothing afterwards, nothing involving arrest. I was specifically talking about the stabbing, Your Honor.*

“The Court: *It’s clear.*” (Italics added.)

After the sidebar, the court instructed the jury, “All right, folks. Just disregard the last question and answer, and we’ll proceed on a different subject.”

Dennery’s attempt to label this inquiry a violation of *Doyle* fails. When the prosecutor asked the allegedly improper questions to which Dennery refers, the topic of discussion was the circumstances surrounding the actual altercation. There were numerous persons present at the time, including Lee, Cameron, and Vaughn. To echo the words of the trial judge, it was “clear” the prosecutor was not directing his questions to Dennery’s post-arrest silence but instead to whether Dennery told the people nearby that he was acting in self-defense. In fact, the court pointedly told Dennery the question was not directed to whether he made statements to the police. The mistake here was made by the volunteered answers of Dennery himself, when he told the jury he chose not to speak with the police. We decline to hold this against the prosecutor. In any event, the trial judge admonished the jury to disregard the questions and answers, and never conveyed to the jury the prosecutor’s use of Dennery’s silence was legitimate, as is required to find *Doyle* error. (*Evans, supra*, 25 Cal.App.4th at p. 368.)

We further find any error harmless for the reasons we have already set out above.

3. Closing Argument

Dennery asserts the prosecutor committed further *Doyle* error during his closing argument. In the context of discussing the video of the comedy routine, the prosecutor told the jury:

“And then 25 days after the stabbing, he goes to a show, and he says all the statements he was embarrassed by. The guy even asks him to comment. What did you stab him with? What

happened? If you were arrested wrongfully for using self-defense, and you're a reasonably minded person, anyone on Earth, when accused of a crime that they don't think they committed would be like, come on, man. Self-defense, man. You know that. I told you that and correct it.

“And he laughed. He just laughed. He walked back and forth from his chair. He giggled. He giggled. He responded. He wants you to think that that show, it's not appropriate to respond. There's six to eight people in the room. It's empty. He's getting questions asked directly to him. He responds to those questions. But never once does he ever say anything about self-defense. In fact, no one associated with this case heard anything about self-defense until voir dire. Period.”

Defense counsel objected. The court admonished the jury that the prosecutor's argument was not evidence and it must “decide the case on the facts.”

Once again, Dennery forfeited his claim. Although defense counsel objected to the prosecutor's argument, she failed to specify that the basis of the objection was *Doyle* error. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1207.) Nor did counsel seek a further admonition from the court instructing the jury to disregard the purportedly improper argument.

In any event, this was not *Doyle* error. A prosecutor is not prohibited from making comments on the state of the evidence. (*People v. Hovey* (1988) 44 Cal.3d 543, 572.) That is exactly what the prosecutor did here; he pointed out that Dennery should have spoken up about his claim of self-defense during his colloquy with the comedian at the nightclub rather than laugh, giggle, and make other comments. In any event, though we think this

allegation of error is meritless, we would find it harmless for the reasons we have already outlined.

II. The Court Did Not Err in Admitting Video of the Comedy Routine

Dennerly contends the trial court erred in allowing the admission of the video in which a comedian recounts and comments on the incident. Dennerly argues the video was inadmissible hearsay, unduly prejudicial, and its admission constituted *Doyle* error and violated the confrontation clause. We disagree.

A. Background

During trial, defense counsel objected to the prosecutor's anticipated use of the video of the comedy routine on the grounds that it was irrelevant, constituted inadmissible hearsay, violated Dennerly's constitutional rights, and was unduly prejudicial. The court overruled the objections, finding the video demonstrated a potential adoptive admission that was highly probative on the issue of self-defense, and its admission did not implicate any constitutional rights.

Before the prosecutor played the video for the jury, the court twice read an instruction on adoptive admissions.⁷ Then,

⁷ The court instructed the jury: "If you should find from the evidence that there was an occasion when the defendant (1) under conditions which reasonably afforded him an opportunity to reply; (2) failed to make a denial or make false, evasive, or contradictory statement in the face of an accusation expressed directly to him or in his presence, charging him with the crime for which the defendant is on trial, or tending to connect him with its commission; and (3) that he heard the accusation and understood its nature, then the circumstance of his silence or evasive conduct on that occasion may be considered

during a pause in the video, the court admonished the jury as follows: “An additional cautionary note, ladies and gentlemen. I do want to tell you what you already know, and that is that there were certain off-subject remarks that were made during the course of this. For example, comments about face tattoos, likelihood there being a conviction, and things like that, witnessing other stabbings, things that don’t relate to this case, and you should not consider in assessing the issues in this matter. [¶] You all understand that, of course. Okay. And the thing is that what you saw and what you heard is only relevant to the extent that you might use the contents reasonably to determine whether the defendant admitted to the crime charged by virtue of his apparent silence in the face of an allegation that he committed the offense alleged in this case. So keep that in mind. There was salty language and that sort of thing there. You’re not to consider that for any purpose whatsoever here. Please keep that in mind.”

B. Analysis

1. The Court Properly Admitted the Video as an Adoptive Admission

Denney first argues the court erred in overruling his hearsay objection and finding the video constituted an adoptive admission. Under the adoptive admission rule, “[e]vidence of a statement offered against a party is not made inadmissible by the

against him as indicating an admission that the accusation was true. [¶] Evidence of an accusatory statements is not received for purpose of proving its truth, but only as it supplies meaning to the conduct of the accused in the face of it. Unless you find that the defendant’s silence or evasive conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement.”

hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.” (Evid. Code, § 1221.) “Under this provision, ‘If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.’ [Citations.]” (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.) “‘To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant’s conduct actually constituted an adoptive admission becomes a question for the jury to decide.’ [Citation.]” (*Id.* at pp. 1189–1190.)

Here, the trial court properly overruled Dennery’s hearsay objection and admitted the video as an adoptive admission. During the routine, the comedian remarked that Dennery stabbed Lee because Lee said he was not funny. This statement was accusatory, as it implied Dennery stabbed Lee out of anger, and not in self-defense. The video also supported an inference that the comedian made the statement under circumstances affording Dennery a fair opportunity to deny the accusation. During the routine, Dennery was sitting only a few feet from the stage and interacted directly with the comedian. At one point, the comedian asked Dennery a question, to which Dennery

responded. Dennery then interrupted the comedian and implored him to use the term “allegedly” when referring to the incident. From this, the jury could have reasonably concluded Dennery had a fair opportunity to respond to the comedian’s accusatory statement. The court properly admitted the video as an adoptive admission.⁸

2. Admission of the Video Did Not Constitute *Doyle* Error

Dennery contends admission of the video was improper because it depicted him exercising his Fifth Amendment right to silence. This is essentially a *Doyle* error argument. *Doyle*, however, does not apply where the defendant remains silent during a conversation with a private party, absent a showing that such silence was an invocation of the defendant’s rights to silence and counsel. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1212, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192; *People v. Medina* (1990) 51 Cal.3d 870, 890–891; *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520.) Here, there is nothing in the record to indicate that Dennery’s behavior during the comedy routine was an exercise of his right to silence. In fact, any doubt on the issue was resolved when Dennery testified at trial that he did not correct the comedian because doing so would have “added fuel to the fire” and it would have been inappropriate to interrupt the comedian during his routine. Dennery did not claim he was exercising his right to remain silent. *Doyle* has no application under these circumstances.

⁸ Because we conclude the video was an adoptive admission, we need not consider Dennery’s confrontation clause argument. (See *People v. Jennings* (2010) 50 Cal.4th 616, 661 [adoptive admissions do not violate the confrontation clause].)

3. The Court Did Not Abuse its Discretion Under Evidence Code Section 352

Dennerly insists the court should have refused to admit the video on the basis that it was unduly prejudicial. Evidence Code section 352 affords the court discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352.) “ ‘ “Undue prejudice” refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis ’ ” (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1276–1277.) Rulings under Evidence Code section 352 are reviewed for an abuse of discretion. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.) Under that standard, the trial court’s ruling will not be disturbed unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Ibid.*)

Here, the court did not abuse its discretion under Evidence Code section 352. To the extent the jury concluded the video demonstrated an adoptive admission, its probative value was great. An admission that Dennerly stabbed Lee because Lee said he was not funny was highly relevant to whether Dennerly acted in self-defense, which was the critical issue for the jury to decide. The jury also could have reasonably concluded Dennerly’s reactions during the routine were otherwise inconsistent with his claim of self-defense.

We acknowledge that the video also presented a risk of prejudice, but it was Dennery's actions which brought that about, so we cannot say it was undue. The video shows Dennery laughing as the comedian mocks prospective jurors and describes an incredibly serious incident of which he was alleged to be the perpetrator. This cavalier attitude toward violence was probative of Dennery's actions on the night of the assault and his attitude about it. In addition, the court took steps to mitigate the risk of prejudice and, on multiple occasions, admonished the jurors on the limited purpose for which they could use the evidence. It also specifically instructed the jurors to disregard "comments about face tattoos, likelihood there being a conviction, and things like that, witnessing other stabbings, things that don't relate to this case, and you should not consider in assessing the issues in this matter." Given these preventative measures, and the fact that the video was highly probative of the critical issue in the case, we cannot say the trial court acted in an arbitrary, capricious, or patently absurd manner in admitting the video.

4. Any Error Was Harmless

Even if it was error to admit the video, any error was harmless under both the federal and state standards. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As we discussed in the previous section, the evidence of Dennery's guilt was overwhelming. Thus, even without the video, there is no reasonable doubt the jury would have convicted Dennery.

III. There Was No Prosecutorial Misconduct

Dennerly contends the prosecutor engaged in more than 60 instances of misconduct that deprived him of his state and federal constitutional rights to due process of law and a fair trial. Although the prosecutor occasionally acted immaturely and unprofessionally, we find his behavior did not rise to the level of prosecutorial misconduct.

A. Governing Law

A prosecutor's improper behavior constitutes a violation of the federal Constitution where it so infects the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Valdez* (2004) 32 Cal.4th 73, 122; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Conduct that does not render a defendant's trial fundamentally unfair under the federal Constitution may still be prosecutorial misconduct under state law when it involves the use of deceptive or reprehensible methods in an attempt to persuade the court or the jury. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) In examining whether such methods were employed, the defendant need not show bad faith on the part of the prosecutor. (*People v. Hill* (1989) 17 Cal.4th 800, 823 (*Hill*).) At the same time, however, a reviewing court should not "lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.] " (*People v. Wilson* (2005) 36 Cal.4th 309, 337–338.) Prosecutorial misconduct under state law requires reversal when a reviewing court finds it is reasonably probable the result of a defendant's trial would have been more favorable without the misconduct. (*People v. Cook* (2006) 39 Cal.4th 566, 608.)

B. Forfeiture

Before we consider the merits of Dennery's prosecutorial misconduct claims, we must first address the People's contention that he forfeited many of his claims on appeal. As a general rule, a defendant's claim of prosecutorial misconduct is deemed forfeited on appeal unless the defendant made a timely objection to the misconduct at trial and requested the jury be admonished to disregard the impropriety. (*People v. Prince* (2007) 40 Cal.4th 1179, 1294.)

Dennery concedes that he objected to only 45 of the roughly 60 instances of misconduct he asserts on appeal. He insists, however, that he was not required to object to every instance of misconduct because doing so would have been futile, ineffective, and counter-productive. (See *Hill, supra*, 17 Cal.4th at p. 821; *People v. Johnson* (1981) 121 Cal.App.3d 94, 103.) Dennery's contentions are belied by the record. The trial court consistently sustained defense counsel's objections and frequently admonished the jury in response. Dennery fails to explain why he could not have expected a similar result had he objected to the other instances of misconduct, or why admonitions would not have been sufficient to cure any harm.

Dennery also urges us to excuse his failure to object because each instance of misconduct was part of a pattern of portraying him as the "violent, dishonest aggressor." (See *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1100.) Not so. Much of the alleged misconduct was completely unrelated to portraying Dennery in a negative light. Dennery, for example, complains that the prosecutor bought lunch for witnesses and referred to an individual juror during closing argument.

Because we are not persuaded that an exception to the general forfeiture rule is warranted, we decline to consider Dennery's claims premised on misconduct for which he did not raise a proper objection below. This includes instances in which the prosecutor allegedly engaged in misconduct by: portraying himself as a "conduit of the people"; portraying Dennery as untruthful; vouching for witnesses by calling Dennery's behavior absurd; appealing to the jurors' sympathies and passions; telling the jury to question Dennery's self-defense claim; buying lunch for witnesses; asking a witness to comment on another witness's testimony; threatening vindictive prosecution; and addressing an individual juror during closing argument.⁹

C. Analysis

1. Attacks on Dennery's Credibility

Dennery contends the prosecutor frequently and improperly attacked his credibility, typically by making argumentative and sarcastic remarks in response to his testimony. The following exchanges during the prosecutor's cross-examination of Dennery are representative of such behavior:

"[Prosecutor]: And that's when he throws the skateboard, says you're not good at comedy, all that stuff. Right?"

"[Dennery]: Was that a question?"

"[Prosecutor]: Yeah, did you hear the 'right' with the question mark at the end of it?"

⁹ Dennery separately forfeited many of these contentions by failing, on appeal, to provide any meaningful argument or authority in support. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945, fn. 9 [declining to consider claim "perfunctorily assert[ed] . . . without argument in support"].)

“[¶] . . . [¶]

“[Prosecutor]: And basically your injuries were scratches, maybe a skin abrasion on your ear according to you. Right?

“[Denney]: Correct.

“[Prosecutor]: How does that sound against three stab wounds to the liver, kidney, and the ass?

“[¶] . . . [¶]

“[Prosecutor]: What’s the purpose of practicing with a knife? Are you cutting fruit with it? Is that why?

“[Denney]: I do cut fruit with it. [¶] . . . When I go to Ralph’s I also get sandwiches a lot, so the rolls, the deli rolls.

“[Prosecutor]: It’s good to know your eating habits. Thank you for that.

“[¶] . . . [¶]

“[Prosecutor: Why did you not photograph your injuries?]

“[Denney]: Because I was in a jail cell.

“[Prosecutor]: You got out on the 18th?

“[Denney]: That was three weeks after.

“[Prosecutor]: You said that bruising was there for about two weeks.

“[¶] . . . [¶]

“[Denney]: Takes about two weeks for cuts to heal and tattoos to heal.

“[Prosecutor]: What a convenient answer.

“[¶] . . . [¶]

“[Prosecutor]: You stabbed him. You go upstairs. You get your bag. You say something like, “I’m White

Tyson,” blah, blah, blah, just like the other witnesses said.

Pretty consistent. Right?

“[¶] . . . [¶]

“[Prosecutor]: What are the views on [the YouTube video of the comedy routine]? Go left to right.

“[Dennery]: 23 . . .

“[Prosecutor]: I’ll submit to you the 23 on the left, that’s the [comedy routine], and most of those are me watching it because I was aghast that you posted that.”

We start by noting that cross examination is not a conversation at a formal tea party between two elegant, genteel, calm, polite individuals who have chosen to meet up for companionship. It is a battle between adversaries, not meant for the faint of heart, which results in unpredictable exchanges. That said, we believe the prosecutor could have tempered his sarcasm.

Nonetheless, we do not find the behavior to have been so pervasive or egregious that it infected the trial with unfairness and constituted a denial of due process under the federal Constitution. Nor has Dennery demonstrated prejudicial misconduct under state law. The prosecutor’s remarks were not likely to deceive the jury on any material issue. Moreover, in each instance recounted above—and most of the other examples Dennery raises on appeal—the court sustained defense counsel’s objection, thus conveying to the jury that the prosecutor’s tactics were improper. The court also frequently reminded the jury that it was to decide the case on the evidence alone, and not the remarks from counsel. We presume the jury followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Thus, it is not reasonably probable that the prosecutor’s behavior

affected the jury's evaluation of the evidence or the rendering of its verdict.

2. Improper Questions

Dennergy lists numerous instances in which the prosecutor purportedly committed misconduct by “editorializ[ing] and elicit[ing] inadmissible testimony” in an attempt to persuade the jury that Dennergy did not act in self-defense. Most of the examples of supposed misconduct involved the prosecutor asking a leading question or seeking to elicit improper lay opinion from a witness. Although many of the questions were objectionable, they were not deceptive or reprehensible. Nor were they so egregious to have infected the trial with unfairness resulting in a denial of due process.

Dennergy, for example, complains about the italicized portion of the following, rather mundane, exchange during the prosecutor's direct examination of Lee:

“[Prosecutor]: After you got stabbed, you yelled at him you can't come back to Venice. Was that a threat?

“[¶] . . . [¶]

“[Lee]: Was not a threat.

“[Prosecutor]: *Just kind of basically saying don't come near me anymore. Is that fair?*” (Italics added.)

We acknowledge the questions were leading, but leading questions are not per se improper. Indeed, leading questions are entirely permissible on cross examination. (Evid. Code, § 767.) Further, it would be a far cry to call such exchanges deceptive, reprehensible, or egregious. This is not prosecutorial misconduct. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 625 [no misconduct where record showed the “normal process of questioning and objections at trial”] disapproved on ground by *People v. Williams*

(2010) 49 Cal.4th 405, 459.) The same is true of the other instances of alleged misconduct.

Dennerly has also failed to show the prosecutor's supposed misconduct was prejudicial. In most instances—including the above example—the court sustained defense counsel's objection or the prosecutor voluntarily withdrew the question, which was sufficient to cure any harm. As best we can tell, Dennerly contends this was not enough because the prosecutor's questions themselves constituted improper testimony that could not be cured by objection. The court, however, frequently instructed the jury not to consider the attorney's statements as evidence, and we presume the jury followed the court's instructions. (*People v. Sanchez, supra*, 26 Cal.4th at p. 852.) There was no prejudicial misconduct. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1002 [prosecutor's inaccurate assertions in opening statement found harmless where trial court instructed the jury that opening statement was not evidence].)

3. Attacks on Defense Counsel's Credibility

Dennerly insists the prosecutor improperly attacked defense counsel's credibility on at least four occasions. "When the prosecution denigrates defense counsel, there is a risk the jury will shift its attention from the evidence to the alleged defense improprieties. [Citations.] For defendant's claim to prevail on the merits we ask 'whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Cash, supra*, 28 Cal.4th at pp. 732–733.) Here, the prosecutor did not engage in such misconduct.

Dennergy first takes issue with the following statement made by the prosecutor while examining Vaughn: “All right. Couple more questions and I’ll be done with you, and defense will have her shot at you.” Defense counsel objected, and the prosecutor responded, “I don’t mean to editorialize, Your Honor. I apologize. It was colloquial speak for her being able to do cross-examination.” The prosecutor’s remark was colloquial, and saying opposing counsel will have a “shot” at a witness is a term commonly used in the courtroom. Further, the prosecutor immediately apologized and explained he did not mean to imply anything nefarious. We do not find it probable the statement in any way damaged the jury’s perception of defense counsel.

Dennergy next contends it was improper for the prosecutor to ask Lee, during redirect: “How about this picture where you’re holding this chef’s knife *as the defense tried to depict as a butcher knife?*” (Italics added.) The prosecutor was referencing a previous exchange between defense counsel and Lee, in which Lee corrected defense counsel after she referred to the knife as a “butcher knife.” This is not prosecutorial misconduct. The prosecutor was referring to defense counsel’s prior characterization of the knife.

Dennergy next asserts it was improper for the prosecutor, during rebuttal, to comment that defense counsel “started to dirty up the victim” and portrayed herself as a “blood spatter expert.” Again, this was not misconduct. “‘A prosecutor may ‘vigorously argue his case and is not limited to ‘Chesterfieldian politeness’[.]’ ” (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) Here, the prosecutor’s description of defense counsel’s tactics was accurate: counsel sought to portray Lee as a violent individual, and made claims about blood spatter despite the lack of

evidentiary support. There was nothing improper about the prosecutor expressing this in a colloquial way.

Finally, Dennery takes issue with the following remark made by the prosecutor during rebuttal: “Don’t let this defense—as good as she is, and she’s good—her job is to create reasonable doubt anywhere she can.” Dennery contends the statement was improper because it implied defense counsel was trying to confuse the jury. We disagree. The prosecutor’s statement was accurate—it was defense counsel’s job to convince the jury there was a reasonable doubt of Dennery’s guilt—and we do not think it reasonably likely the jury understood the comment in the way Dennery suggests. (See *People v. Gionis*, *supra*, 9 Cal.4th at p. 1217 [not misconduct for prosecutor to comment that defense counsel’s job is to get the defendant off].)

4. Vouching for Witnesses

Dennery contends the prosecutor improperly vouched for Lee during closing argument when he stated, “[Lee] got a little testy during the end [of his testimony]. I think I probably would too if I was summarizing for two days what happened to me, what my injuries were, and finally saying something along the lines of his anger finally matching up with. But that’s for you to decide, not for me to say.” A prosecutor may comment on a witness’s credibility based on the evidence at trial, but is prohibited from vouching for a witness’s credibility by explicitly or implicitly referring to matters outside the trial record bolstering the person’s testimony. (*People v. Turner* (2004) 34 Cal.4th 406, 432–433.) Here, the prosecutor properly invited the jury to rely on its common sense in evaluating whether Lee’s irritability reflected on his credibility. (See *Hill*, *supra*, 17 Cal.4th at p. 819 [counsel may state matters not in evidence but

which are common knowledge or illustrations drawn from common experience].) The prosecutor did not improperly vouch for Lee by referring, explicitly or implicitly, to any outside evidence.

5. Shifting the Burden of Proof

Dennergy argues the prosecutor improperly shifted the burden of proof by commenting on the defense's failure to produce witnesses corroborating his testimony. Specifically, he takes issue with the following comments: "The truth of the matter is the defense has the same exact subpoena power under the court that the People do. If he had one person that he could have brought into court that said I saw the whole thing, man. Lee was the jerk. Lee was the aggressor. Lee was the ass. Lee was the one that had this coming. They would have done it." This statement was a proper comment on the lack of witnesses corroborating Dennergy's account of the incident; it did not improperly shift the burden of proof. (See *People v. Varona* (1983) 143 Cal.App.3d 566, 570 ["a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story"]; *People v. Bemore* (2000) 22 Cal.4th 809, 846.) In any event, immediately after making the statement, the prosecutor reminded the jury that the People had the burden of proof on the self-defense issue. The court additionally instructed the jury on the proper burden of proof. This was sufficient to cure any prejudice.

6. Unfairly Surprising the Defense

Dennergy asserts the prosecutor unfairly surprised the defense on two occasions. First, he complains that the prosecutor did not display an exhibit to defense counsel before questioning a witness about it. When brought to the prosecutor's attention, he

apologized but noted defense counsel already had a copy of the exhibit. Dennery next complains about an incident where the prosecutor's witness started to testify to a statement made by a third party. Defense counsel objected on hearsay grounds, and during a sidebar, counsel stated, "it looks like the District Attorney anticipated this statement coming in. I've never heard of this prior to today." The court, however, found the prosecutor did not anticipate the testimony, noting it was clear the prosecutor was "winging this altogether." After conducting an Evidence Code section 402 hearing on the hearsay issue, the court ruled the statement inadmissible.

Simply stated, we find nothing improper about either exchange. Dennery's assertion that this amounts to prosecutorial misconduct borders on frivolous.

7. Explaining a Witness's Failure to Testify

Denny contends the prosecutor committed misconduct when, outside the presence of the jury, he informed the court that a witness did not want to testify because he felt threatened by Dennery. Dennery provides no meaningful analysis to explain why this statement, made outside the presence of the jury, was improper or prejudicial. Accordingly, we consider the point forfeited. (See *People v. Marshall, supra*, 50 Cal.3d at p. 945, fn. 9 [declining to consider claim "perfunctorily assert[ed] . . . without argument in support"].)

IV. No Cumulative Error Warrants Reversal

Because we have found no prejudicial error, we reject Dennery's claim that his conviction must be reversed for the effect of cumulative errors.

V. The Protective Order Was Unauthorized

Dennerly contends, and the Attorney General concedes, that the court improperly imposed a protective order at sentencing. We agree.

At sentencing, the court imposed a ten-year protective order pursuant to section 136.2, subdivision (i)(1), which prevents Dennerly from, among other things, contacting Lee, Cameron, and Vaughn. Section 136.2, subdivision (i)(1), allows a trial court to issue an order restraining the defendant from any contact with a victim, but only if the defendant is convicted of certain crimes. (§ 136.2, subd. (i)(1).) Here, Dennerly's conviction for assault with a deadly weapon does not qualify for a protective order under section 136.2, subdivision (i)(1). Consequently, the protective order is unauthorized.

DISPOSITION

The protective order is stricken. The judgment is affirmed in all other respects.

BIGELOW, P.J.

We concur:

GRIMES, J.

RUBIN, J. *

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.